

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY
01/08/2002

*** FILED ***
01/17/2002
CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000067

Docket Code 512

FILED: _____

STATE OF ARIZONA

CARRIE M COLE

v.

GWYNNE ALLYN ANDERSON

PATRICIA M SHALER

REMAND DESK CR-CCC
SCOTTSDALE CITY COURT

MINUTE ENTRY

SCOTTSDALE CITY COURT
Cit. No. #1434576
#1434576X

Charge: 1. DUI/ALCOHOL
2. DUI WITH .10 OR HIGHER

1. EXTREME DUI BAC .18 OR MORE WITHIN TWO HRS OF DRIVING

DOB: 09/13/50
DOC: 09/15/99

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since oral argument on December 19, 2001. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Scottsdale City Court, and the arguments and Memoranda of counsel.

Appellant was charged with Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1); Driving with a Blood Alcohol Content of .10 or more, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2); and Extreme DUI, a class 1 misdemeanor in violation of A.R.S. Section 28-1382(A). Appellant entered pleas of Not Guilty. Appellant's trial commenced October 25, 2000 and Appellant was found guilty at the conclusion of the trial on October 26, 2000. Sentencing occurred January 19, 2001. A timely Notice of Appeal was filed in this case.

The first issue raised by Appellant concerns the sufficiency of the evidence to constitute a *corpus delicti* and whether the trial court erred in finding a *corpus delicti* on the evidence presented. Unfortunately, Appellant's counsel failed to object in a timely fashion to admission of Appellant's statements. Absent fundamental error, the failure to object at trial waives that issue on appeal.¹ The Arizona Supreme Court has defined "fundamental error" as an error that "reaches the foundation of the case or takes from the Defendant a right essential to his defense, or is an error of such dimensions that it cannot be said it is possible for a Defendant to have had a fair trial."² The Arizona Supreme Court has also explained that prejudice resulting from an error that was not objected to by the Defendant must be analyzed in the light of the entire record.³ And, where there is "substantial evidence in the record to support the verdict and it can be said that the error did not, beyond a reasonable doubt, contribute significantly to the verdict, reversal is not required."⁴ Excluding any evidence of statements by Appellant, the record reflects substantial evidence was presented of Appellant's guilt on all charges. Therefore, this Court finds no fundamental error.

The second issue raised by Appellant claims that the trial court erred in denying Appellant's Motion for Judgment of Acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure. A Judgment of Acquittal is only required when there is no "substantial evidence to warrant a conviction."⁵ When reviewing the sufficiency of the evidence, an appellate court must not reweigh the evidence to determine if it would reach the same conclusion as the original trier at fact.⁶ All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.⁷ If conflicts in evidence exists, the appellate court must resolve

¹ *State v. Van Adams*, 194 Ariz. 408, 984 P.2d 16, cert.denied, 120 S.Ct. 1199, 145 L.Ed.2d 1102 (1999); *State v. Gallegos*, 178 Ariz. 1, 870 P.2d 1097, cert.denied, 115 S.Ct. 330, 513 U.S. 934, 130 L.Ed.2d 289, appeal after remand, 185 Ariz. 340, 916 P.2d 1056, cert.denied 117 S.Ct. 489, 519 U.S. 996, 136 L.Ed.2d 382 (1994); *State v. Valles*, 162 Ariz. 1, 780 P.2d 1049 (1989).

² *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988).

³ *State v. Gallegos*, supra; *State v. Thomas*, 130 Ariz. 432, 636 P.2d 1214 (1981).

⁴ *State v. Gallegos*, 178 Ariz. at 11, 870 P.2d at 1107, citing *State v. Thomas*, 130 Ariz. at 436, 636 P.2d at 1218.

⁵ *State v. Doss*, 192 Ariz. 408, 966 P.2d 1012(App. 1998).

⁶ *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed. 2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

⁷ *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

such conflicts in favor of sustaining the verdict and against the Defendant.⁸ An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.⁹ When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.¹⁰ The Arizona Supreme Court has explained in *State v. Tison*¹¹ that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.¹²

In this case substantial evidence was introduced of Appellant's guilt: the fact that Appellant was still sitting in the driver's seat when the first witnesses arrived, Appellant smelled of alcohol, her eyes were watery and bloodshot. Appellant demonstrated six cues of the Horizontal Gaze Nystagmus test. Appellant's blood alcohol content was .27. And, the circumstantial physical evidence showed that Appellant's car had been driven off the road into a mud bank.

Appellant also contends that the trial court erred allowing a jury instruction to go to the jury with its caption. One of the instructions was transmitted to the jury with the caption above the instruction in bold face type. The caption stated "with affirmative defense". However, Appellant failed to object to this instruction. Clearly, this Court can say that the instruction did not contribute to the jury's verdict in any manner as the body of the instruction also contained the phrase "affirmative defense". Any error was harmless beyond a reasonable doubt.

Finally, Appellant contends that the trial court erred in failing to give Defendant's requested jury instruction #1.¹³ This Court finds no error in the refusal to give Appellant's requested jury instruction for the reason that it does not appear that this is a "physical control" case. The evidence presented indicated that Appellant had driven off the road into a mud bank and was observed by witnesses as she was still sitting in her car. The same witnesses had observed that Appellant's car was not there a few moments earlier. After Appellant's car hit the mud bank, it was immobilized and had to be towed. The trial

⁸ *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

⁹ In re: Estate of Shumway, 197 Ariz. 57, 3 P.3d 977, review granted in part, opinion vacated in part 9 P.3d 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).

¹⁰ *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; *State ex rel. Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

¹¹ SUPRA.

¹² Id. At 553, 633 P.2d at 362.

¹³ This instruction included language from the former Arizona recommended jury instruction on "actual physical control" of a motor vehicle.

court correctly refused this instruction as an instruction on “actual physical control” could have been confusing and, more importantly, misleading to the members of the jury.

For all of the reasons stated above,

IT IS ORDERED affirming the judgments of guilt and sentences imposed by the Scottsdale City Court.

IT IS FURTHER ORDERED remanding this matter back to the Scottsdale City Court for further and future proceedings.